(5)

No. 91-983

In The

Supreme Court of the United States

October Term, 1991

ALLSTATE INSURANCE COMPANY,
an Illinois Corporation,

Petitioner,

v.

SAMUEL F. FORTUNATO,
Commissioner of Insurance of
The State of New Jersey,

Respondent.

On Petition For A Writ Of Certiorari To The Appellate Division Of The Superior Court Of The State Of New Jersey

MOTION FOR LEAVE TO FILE AND BRIEF AMICI CURIAE OF THE NATIONAL ASSOCIATION OF INDEPENDENT INSURERS, THE ASSOCIATION OF CALIFORNIA INSURANCE COMPANIES, THE INSURANCE FEDERATION OF MINNESOTA, THE INSURANCE FEDERATION OF PENNSYLVANIA, INC., AND THE WISCONSIN INSURANCE ALLIANCE IN SUPPORT OF PETITIONER

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On Petition For A Writ Of Certiorari To The Appellate Division Of The Superior Court Of The State Of New Jersey

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

Pursuant to Rule 37.4 of the Rules of this Court, The National Association of Independent Insurers ("NAII"), The Association of California Insurance Companies, The Insurance Federation of Minnesota, The Insurance Federation of Pennsylvania, Inc., and The Wisconsin Insurance Alliance hereby respectfully move for leave to file the attached brief *amici curiae* in support of petitioner Allstate Insurance Company. The consents of the petitioner and of respondents Aetna Casualty & Surety Company and

Colonial Penn Insurance Company have been obtained. The New Jersey Attorney General has withheld consent.

Movants are respectively a national and state insurance trade associations representing insurers throughout the United States.[1] The member companies of movants write a significant percentage of the automobile insurance policies issued annually in the United States. Thus, movants are vitally interested in the issue presented in this case – whether a satisfactory mechanism for interim relief and judicial review is afforded under a state statute regulating automobile insurance rates so as to protect fundamental constitutional rights and avoid the imposition of confiscatory rates.

In its brief, petitioner addresses the laws of the State of New Jersey and the direct impact of those laws and the decision below on petitioner. Movants seek to present this Court with a broad view of automobile insurance, state insurance regulation, and the impact of regulations and decisions such as the one at issue on the insurance industry and the nation as a whole. In addition, movants set forth in the attached brief decisions of state courts of last resort and federal courts which are in conflict with the decision below. Movants believe that the attached brief will assist the Court in understanding the importance of the issue presented in this case to the insurance industry

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[1] Petitioner Allstate Insurance Company is a member company of all *amici* except The Wisconsin Insurance Alliance.

at large, and the necessity for action by this Court to address the significant constitutional issues raised herein.

WHEREFORE, *amici curiae* respectfully request that their motion for leave to file an *amici curiae* brief in support of petitioner be granted.

Dated: Norwich, Vermont
January 17, 1992

Respectfully submitted,

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STATEMENT OF INTEREST

The National Association of Independent Insurers ("NAII") is a national trade association representing the interests of over 560 property and casualty insurance companies. NAII member companies underwrite approximately 36% of the private automobile insurance in the United States. The Association of California Insurance Companies, the Insurance Federation of Minnesota, the Insurance Federation of Pennsylvania, Inc., and the Wisconsin Insurance Alliance ("Wisconsin") are state trade associations representing the interests of member insurers in their respective states. Allstate Insurance Company ("Allstate"), the petitioner, is a member company of all *amici* except Wisconsin.

The *amici* have a vital interest in the rate regulation of the automobile insurance industry by the states and the need for a mechanism for interim rate relief and judicial review to avoid the imposition of a confiscatory rate structure.

SUMMARY OF ARGUMENT

The insurance industry in the United States is facing a crisis. Insurers, experiencing increasing liabilities and unable to earn a fair rate of return, have been forced to withdraw from critical markets. Major insurer insolvencies have already been experienced and the threat of mounting insurer insolvencies is looming on the horizon. Congress and the state legislatures, as well as the state courts, have been grappling with various aspects of the problem. The crisis facing the insurance industry in general and the auto insurance industry in particular poses a difficult dilemma for government, the courts, industry and our society as a whole. The solutions are not self evident and they will take time and a great deal of effort to formulate and implement.

Amici do not presume to ask this Court to resolve or remedy this multi-faceted nationwide problem. But *amici* do believe that this Court's intervention is essential to

protect certain fundamental constitutional rights that are being violated, and to ensure that the American system of automobile insurance will not be destroyed, but will be able to continue, while the broader solutions to the overall problem evolve.

The necessity of relief from this Court arises out of efforts by state legislatures in recent years to implement a variety of mechanisms to depress automobile insurance rates, and in particular the sweeping legislation enacted by the State of New Jersey in 1990 following the election of Governor Jim Florio, entitled The Fair Automobile Insurance Reform Act of 1990 ("FAIRA").[1] The New Jersey legislation required assumption of enormous debt by insurers, elimination of various charges, and mandatory coverages, while at the same time purporting to guarantee to the insurers their constitutional right to an adequate rate of return.

The validity of the statute and its implementation, and the proposition that an adequate rate of return is in fact feasible under the statute, have been subject to extensive challenges, and numerous carriers have announced their intention to withdraw from the state as a result of the legislation. These challenges and withdrawals will be addressed in complex judicial and administrative hearings, which may take years to resolve. However, in the interim, by virtue of the decision below, the carriers are denied a viable mechanism for achieving an adequate and equitable return, should their challenges be sustained. Absent such a mechanism, any ultimate relief would only be prospective, and therefore illusory as to the periods that have passed, and the automobile insurance system may be destroyed in the meantime.

As Justice Garibaldi of the New Jersey Supreme Court observed in expressing her own doubts as to the denial of an earlier "facial" challenge to FAIRA:

> Neither the insurance company not this state's insurance market will be adequately protected

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[1] The Statute is reproduced in Appendix 7 to the Petition.

> by the pyrrhic discovery after it has ceased doing business here (and perhaps elsewhere) that it deserved a rate increase five years ago.[2]

Nevertheless, when faced with an "an applied" challenge to FAIRA in the instant case, the New Jersey Court refused to act.

Thus, the issue presented by this case is whether a state can impose a regulatory system which is alleged to be confiscatory, without providing a viable timely mechanism for review, which will afford meaningful relief if the system is determined to be confiscatory. Other decisions in both federal and state courts have recognized the inherent danger and risks of such legislation and have taken steps to protect the carriers, the consumers and the overall insurance system, while these issues are being resolved. New Jersey statute and the decision of the New Jersey Court afford no such protection. They should not be permitted to stand.

It should be emphasized that the Petition challenges the validity of the statute as applied. It is the contention of the Petition that Allstate cannot be compelled by the application of the statute to write new business without first being afforded a viable mechanism to ensure adequate rates. The issues raised by the Petition are thus ripe for review by the Supreme Court.

ARGUMENT

I. The Importance of Insurance In General, and Automobile Insurance in Particular

As Professor (now Judge) Keeton has observed, "[i]nsurance is an important, and perhaps essential, aspect of the business and personal lives of the vast majority of individuals living in the United States."[3]

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[2] *State Farm Mutual Auto. Ins. Co. v. State,* 124 N.J. 32, 68, 590 A.2d 191, 210 (1991) (Garibaldi J., concurring).

[3] R. Keeton and A. Widiss, *Insurance Law, A Guide to Fundamental Principles, Legal Doctrines and Commercial Practices* 1 (1988).

Billions of dollars of private and commercial insurance coverage is written every year in the United States.[4]

Insurance is a method of managing and allocating risk by distributing it among large numbers of individuals or enterprises.[5] The simple fact is that virtually every aspect of business and personal life entails some measure of the risk of injury or loss. Those risks are so significant that without a means of protection against such risks we could not function on an individual or societal basis. Insurance provides the means of protection by allocation of such risks, and insurance companies underwrite and manage that allocation of risk.[6]

The automobile, and automobile insurance, have played a particularly unique role in the development of the United States in the twentieth century. From the days of Henry Ford and the Model T, the automobile has been and even today remains the symbol of the American dream, the hallmark of American business and technology. The vast majority of American adults own or drive cars. The network of roads and highways crisscrossing the nation is unequalled throughout the world.

Yet, with the great success of the automobile came risks: risk of accident, risk of theft, risk of damage to the auto, and risk of serious injury and death to drivers, passengers and pedestrians. The American tort system, for better or for worse, has provided a mechanism for injured persons to recover for their injuries from auto accidents, recoveries which would far exceed the abilities to individuals or companies to pay on a personal basis. Automobile insurance has provided the means of compensating for automobile damage and injury and has

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[4] *Id.*

[5] *See* K. Abraham, *Distributing Risk: Insurance Legal Theory and Public Policy* 1-2 (1986).

[6] *See generally id.*

provided the means to tolerate the risks of the automobile, which is so important to our society. Thus, automobile insurance plays a critical role and function. If its ability to function is threatened, our modern American way of life is threatened.

II. Insurance Crises of the 80's and the 90's

In the 1980's the insurance industry and the public faced a crisis of insurance availability. Insurance was unavailable for many types of risks, *inter alia,* because underwriting of the 70's led to unanticipated losses, and insurers were unwilling or unable to commit their resources to underwriting similar risks in the early and mid 1980's.[7] As a result, schools, day care centers, ect. closed because insurance was unavailable.[8] This crisis was precipitated by economic and market forces, and towards the end of the 80's was showing signs of amelioration.[9]

However, the 90's is seeing the beginnings of a crisis of a different and much more ominous nature, the

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[7] *See In Re Insurance Antitrust Litigation,* 723 F. Supp. 464 (N.D. Cal. 1989), rev'd and remanded, 938 F.2d 919 (9th Cir. 1991); Priest, *The Current Insurance Crisis and Modern Tort Law,* 96 Yale L.J. 1521 (1987); Abraham, *Making Sense of the Liability Insurance Crisis,* 48 Ohio St. L.J. 399 (1987).

[8] *See* Priest, *supra* note 7, at 1521-22; Gillies, *Managing the Market Regulating the Insurance Business,* 18 Brief 16 (1988) (A.B.A. Tort and Ins. Prac. Sec.); New York Times, March 28, 1986, at D16, col.1 (Congress "swamped" with warnings that small businesses are facing bankruptcy due to high cost and/or unavailability of liability insurance).

[9] *See* New York Times, Feb. 16, 1987 § 1, at 12, col. 3 (Liability insurance crisis easing, with insurance becoming more available).

insolvency of major insurers and the forced withdrawal of insurers from the market place.[10]

This is due to many complex factors. Certainly, what turned out to be imprudent investments in real estate and junk bonds has been a contributing factor.[11]To some extent, this can be remedied by future investments strategies and controls.

However, what is of greater and perhaps the greatest concern, and of particular relevance here, is the forced withdrawal from the market place by insurers because they are subjected to a rating structure which prevents them from operating profitably, and indeed makes it inevitable that they will lose money, and the failure of the legislatures and the courts to provide adequate and timely means of review and redress. A free market economy cannot survive in such an environment.

This has been of particular and growing concern in the automobile insurance field.

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[10] In April of 1991, California regulators seized control of Executive Life Insurance Company, the largest failure of an insurer to date. New York Times, April 12, 1991, at Al, col. 6. Also seized in 1991 were First Capital Life Insurance Company, Monarch Life Insurance Company, and Mutual Benefit Life Insurance Company. *See* New York Times, July 19, 1991, at Al, col.1. *See also Trouble in Insurance City*, Boston Globe, Nov. 6, 1990, at 25p; *The Travelers Rides into the Storm*, New York Times, Dec. 2, 1990, § 6, part 2, at 13; *Will Insurance Industry Go the Way of S & L's?*, Washington Post, July 1, 1990, at H1; Subcomm. on Oversight and Investigations of Comm. on Energy and Commerce 101st Cong., 2d Sess., Report on Insurance Company Insolvencies (Comm. Print 1990) (John D. Dingell, Chairman). Figures on insolvencies of property and casualty insurers compiled by the National Conference of Insurance Guaranty Funds, the National Association of Insurance Commissioners, and A. M. Best Company for the years 1980-1991 are set forth in Gastel, *Insolvencies/Guaranty Funds*, Insurance Information Institute (1992) (available on NEXIS).

[11] *Id.*

III. Rate Regulation and Suppression of Auto Insurers in the 90's

Following the decision of this Court in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944) and the promulgation of the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.*, the following year, regulation of insurance was largely left to the states.

Automobile insurance has for at least two decades been perhaps the most heavily regulated of all forms of insurance by the states. This is due to the fact that the vast majority of adult Americans drive cars and that there is an inherent potential for serious accident and injury. Mandatory auto insurance laws, no-fault laws, and assigned risk plans implemented since the 1970's represent attempts by the states to make available the necessary coverages.[12]

In addition to the laws designed to ensure coverage, the states adopted a variety of approaches to regulate insurance rates. Historically, these included competitive systems where rates were set entirely by market forces,

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[12] Twenty-four states adopted no-fault laws between 1970 and 1975. J. O'Connell, *The Lawsuit Lottery, Only the Lawyers Win* 158 (1979). Examples of no-fault statutes are N.Y. Ins. Law § 5101 *et seq.* (Consol. 1985); Mich. Comp. Laws Ann. § 500.3101 *et seq.* (West 1983); and Conn. Gen. Stat. Ann. § 38-319 *et seq.* (West 1987). For examples of mandatory insurance laws, *see* Ill. Ann. Stat. ch. 95 1/2 para. 7-601 (Smith-Hurd 1991) and Conn. Gen. Stat. Ann. § 38-327 (West 1987). Cal. Ins. Code § 11620 *et seq.* (West 1988) and Mich. Comp. Laws Ann. § 500.3301 *et seq.* (West 1983) are examples of assigned risk statutes.

For cases upholding these kinds of laws, *see Montgomery v. Daniels*, 38 N.Y.2d 41, 340 N.E.2d 444, 378 N.Y.S.2d 1 (1975) (upholding constitutionality of New York no-fault law); *Gentile v. Altermatt*, 169 Conn. 267, 363 A.2d 1, *appeal dismissed*, 423 U.S. 1041 (1976) (upholding Connecticut mandatory insurance law); *California State Auto. Ass'n Inter-Ins. Bureau v. Maloney*, 341 U.S. 105 (1951) (upholding California assigned risk statute).

with rates being filed with the state for information purposes only, as well as the so-called "prior approval" systems. However, even in the prior approval system, rates would generally become effective if not disapproved within a limited period such as 90 days. Other variations have included "file and use" and "flex" rating, which provided for immediate and automatic rate increases as needed.[13]

Under all these rate regulation systems, rates were set in what was essentially a free market system, subject to appropriate review by the states. Mechanisms existed for obtaining interim rate increases, and for expeditious review of administration and judicial rating decisions.[14]

However, beginning at the end of the 1980's with Proposition 103 in California, states through voter initiatives, political mandates or otherwise, took a new turn in implementing rate suppression mechanisms. Thus, in California under Proposition 103, an automatic 20% reduction in rates was required. Cal. Ins. Code § 1861.01 (West 1988). Similarly, in Pennsylvania, 1990 rates were rolled back to 1989 levels and frozen. 75 Pa. Cons. Stat. § 1799.7(b) & (d) (Supp. 1991). Nevada mandated a rollback of the 1989-90 rates to a level 15% below the rates in effect on July 1, 1988. 1989 Nev. Stat. 784. In New Jersey under FAIRA, a reduction in charges was mandated, as was the absorption of an enormous debt from the Joint Underwriting Association and the mandatory assumption of coverages at reduced rates for thousands of drivers previously uninsurable in the voluntary market.[15]

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[13] For an explanation of historical rating systems, *see* Gastel, *Rate Regulation*, Insurance Information Institute, (1991); K. Abraham, *Insurance Law and Regulation* 104 (1988); *see* also O. Kramer, *Rate Suppression and its Consequences* (1991).

[14] *Id*.

[15] *See* FAIRA §§ 76, 78, N.J. Stat. Ann. 17:33B-49, 33B-51; FAIRA § 88 (c)(5), N.J. Stat. Ann. 17:33B-11(c)(5); additional details of FAIRA are provided in the Petition.

These rates suppression statutes have been subject to challenges on numerous grounds. *See Calfarm Ins. Co. v. Deukmejian*, 48 Cal.3d 805, 771 P.2d 1247, 258 Cal. Rptr. 161 (1989) (holding on due process and taking grounds that California statute prohibiting rate relief for first year unless an insurer was in danger of insolvency, was unconstitutional); *Guaranty Nat'l Ins. Co. v. Gates*, 916 F.2d 508 (9th Cir. 1990) (Nevada statute prohibiting inadequate rates nonetheless held unconstitutional because statute defined inadequate as guaranteeing only a break even return, not a constitutionally fair and reasonable return); *cf. Liberty Mutual Ins. Co. v. Jackson*, Civ. Action No. 90-961 (D.N.J. 1990); *Allstate Ins. Co. v. Florio*, Civ. Action No. 90-1366 (D.N.J. 1990) (challenges to FAIRA on impairment of contract and other grounds dismissed on the basis of abstention and tax injunction statute); *State Farm Mutual Auto. Ins. Co. v. State, supra*, 124 N.J. 32, 590 A.2d 191 (1991) (facial challenge to New Jersey statute dismissed); *Keystone Ins. Co. v. Foster*, 732 F. Supp. 36 (E.D. Pa. 1990) (rate freeze statute held not unconstitutional where rate relief was available in extraordinary circumstances).

The promulgation of these statutes was met with withdrawals of major carriers from critical markets.[16]

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[16] For example, Travelers has withdrawn from the California and Pennsylvania automobile insurance markets, and has also stopped offering automobile insurance in nine other states. Los Angeles Times, January 21, 1991, at D6, col. 1. *See Travelers Indem. Co. v. Gillespie*, 50 Cal. 3d 82, 785 P.2d 500, 266 Cal. Rptr. 117 (1990). Aetna Life & Casualty has withdrawn from Pennsylvania and South Carolina. 23 Executive Letter, Insurance Information Institute Nos. 20, 21 (May 14, 21, 1990). When Cigna Property and Casualty Company and St. Paul Company withdrew from the Massachusetts automobile insurance market, they followed twelve other insurers (including Petitioner) that had either left the Massachusetts market or had become insolvent since 1988. *Two More Car Insurers to Quit*

(Continued on following page)

Moreover, the withdrawals have escalated as carriers, who attempted to comply with the new statutes and regulations and at the same time earn an adequate rate of return, found they were unable to do so. This is best illustrated by the case of Allstate in New Jersey.[17]

The benefits of the rate suppression statutes are proving dubious at best. A lengthy study published in November 1991, by Orin Kramer, who previously headed New York Governor Cuomo's task force on the insurance liability crisis, concluded:

> The central fallacy underlying rate suppression is the belief that it offers an economic free lunch: that if insurers are coerced into providing lower rates than would exist in a competitive pricing environment, other societal goals – insurance availability, service levels, accident protection, pricing equity and insurer solvency – will not suffer. The study documents that rate suppression buys short-term price relief to the detriment of those other policy objectives.[18]

In these circumstances, the ultimate outcome of the litigations and the economic and social benefits of the rate suppression statutes remain in serious doubt. While this is a matter of great concern to the industry, we recognize that these are issues which will be determined over time and in different forums.

The issue that is presented today, however, is whether or not the statutes *and* their implementation satisfy fundamental constitutional requirements.

(Continued from previous page)

State, Boston Globe, October 25, 1990, at 55p. A subsidiary of Hartford Insurance Company and others petitioned to withdraw from New Jersey upon promulgation of FAIRA. *See In The Matter of The "Plan For Orderly Withdrawal From New Jersey" of Twin City Fire Ins. Co.*, 248 N.J. Super. 616, 591, A.2d 1005 (App. Div. 1991).

[17] *See* the Petition and the decision below.

[18] O. Kramer, *supra* note 13, at ii.

As set forth above, in the *Calfarm* and *Gates* cases, the California Supreme Court and the Court of Appeals for the Ninth Circuit recognized that a rate suppression statute which was on its face confiscatory violates the Fourteenth Amendment. Thus, provisions of the California and Nevada statutes which permitted rate relief only in the case of insolvency, or permitted at most break even return, were found to be constitutionally impermissible.[19]

The New Jersey statute, which was clearly drafted with the California decision in mind, purported to overcome this problem by providing on its face that the insurers are entitled to earn an adequate rate of return.[20] However, where the New Jersey statute fails – and this is a more subtle and sinister infringement on constitutional guarantees – is that it does not provide adequate protection of the carriers' constitutional rights in its mechanisms for implementation. Thus, the statute as applied does not meet fundamental constitutional requirements.

IV. The Problem of the Unavailability of Interim Relief

In *Calfarm*, the California Supreme Court prudently stated "we focus less on the rate specified in the statute than on the ability of the seller to obtain relief if that rate proves confiscatory."[21] Thus, the California Court recognized that while it is not the role of the courts in the first instance to determine the adequacy of the rates, it is the role of the courts to ensure that a mechanism exists for relief if the mandated rates are determined to be inadequate. The California Court went on to state "recognizing that virtually any law which sets prices may prove confiscatory in practice, courts have carefully scrutinized such

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[19] *Calfarm*, 48 Cal.3d at 821, 771 P.2d at 1255-56, 258 Cal. Rptr. at 169; *Gates*, 916 F.2d at 510.

[20] FAIRA §2(g), N.J. Stat. Ann. 17:33B-2(g).

[21] *Calfarm*, 48 Cal.3d at 816, 771 P.2d at 1252, 258 Cal. Rptr. at 166.

provisions [for rate adjustment] to ensure that the sellers will have an adequate remedy for relief from confiscatory rates."[22]

The problem with the New Jersey legislation, and with the decision of the New Jersey Court, is that while the statute pays lip service to the constitutional requirement that the carriers must earn a fair and reasonable return, it does not enable them to do so for the following reasons:

1. The statute does not provide for and the New Jersey courts have not permitted a satisfactory mechanism for an interim challenge to the adequacy of the rates set by the state administration agency or for judicial review of any such challenge. Disputes as to the adequacy of rates will thus take several years to resolve.

2. In the interim, carriers must take on thousands of new customers, who did not previously qualify in the voluntary market, at rates the carriers contend they have demonstrated to be *prima facie* confiscatory.[23]

3. Even if the carriers wish to seek to withdraw from the market, as Allstate and others have been forced to, the process takes several years and they must take on new customers as well as continue with old customers at the rates they believe to be confiscatory.[24]

4. No mechanism exists under FAIRA to recover losses for periods that have passed – which as set forth in the Petition, may be enormous – if in the end it is

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[22] *Id.* at 817, 771 P.2d at 1253, 258 Cal. Rptr. at 167. The *Calfarm* court also pointed out that "the terms 'fair and reasonable' and 'confiscatory' are antonyms, not separate tests." *Id.* at 816n.5, 771 P.2d at 1252n.5, 258 Cal. Rptr. at 166n.5 (citations omitted).

[23] FAIRA §88, N.J. Stat. Ann. 17:33B-11(c)(5).

[24] FAIRA §72, N.J. Stat. Ann. 17:33B-30; *see also* footnote 16, *supra.*

determined that the rates were not fair and reasonable and were in fact confiscatory.[25]

Thus, despite the apparently benign language of the New Jersey statute that purports to guarantee an adequate rate of return, a structure has been set up under which, even if the carriers ultimately demonstrate that the rates are inadequate and confiscatory, they will be denied any possibility of recovery.

The carriers are effectively denied their day in court. Their property is being expropriated by the state without a meaningful opportunity for constitutional review.

The carriers cannot continue to exist and to provide the auto insurance that is vitally needed in this environment. Ironically, the very problem raised by the statute and the decision below was foreseen by Justice Garibaldi of the New Jersey Supreme Court in the decision rejecting the "facial challenge" to the constitutionality of the New Jersey statute in the *State Farm* case. Justice Garibaldi stated:

> I concur in the Court's opinion [upholding the facial validity of the statute]. However, I write separately to emphasize that this statute is still susceptible to an as-applied challenge. I have grave doubts about the ability of the Commissioner of Insurance, under present regulations, to guarantee insurance companies a constitutionally-adequate rate of return. The present rate-making structure is lengthy and complex; the addition of the special separate-hearing procedure for rate relief will only add to existing delay. Although the length of time before rate relief is granted may not, alone, make the scheme constitutionally defective, *Helmsley v. Borough of Fort Lee*, 78 N.J. 200, 223, 394 A.2d 65

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[25] New Jersey law does not permit recovery of losses resulting from inadequate rates through subsequent rate increases. *In Re Elizabethtown Water Co.*, 107 N.J. 440, 449-51, 527 A.2d 354, 359-60 (1987).

(1978), appeal dismissed, 440 U.S. 978, 99 S.Ct. 1782, 60 L.Ed.2d 237 (1979) the possibility for relief from confiscatory rates must be realistic. *Id.* at 226, 394 A.2d 65; *See* also *Calfarm Ins. Co. v. Deukmejian*, 48 Cal.3d 805, 817, 771, P.2d 1247, 1258, 258 Cal.Rptr. 161, 167 (1989) (court may strike down facially-valid law because procedures enacted under it "were so cumbersome and time-consuming that [affected persons] could not in reality obtain relief from confiscatory rates").

* * *

Current economic conditions compound my concerns. In the past, insurance companies, like banks, were always considered financial bulwarks. That is no longer true. *See* Crenshaw, "Personal Finance: Finding The Best Life Insurance; Buyers Must Consider Firm's Solvency As Well As Policy Cost," *Washington Post*, December 16, 1990, at H9 ("in the current economic uncertainty, the possibility [of an insurance company becoming insolvent] can no longer be overlooked"); Floyd, "Market Place: Failing Insurers' Bailout Cost Rises," *New York Times*, November 15, 1988, at D8 col. 3 (estimates of costs of saving failing insurance companies have soared from $82,000,000 in 1984 to $917,000,000 in 1987). Although the size of the accumulated unpaid debt of the Joint Underwriting Association is deplorable, the failure or withdrawal of insurance companies providing coverage in this state would prove even more damaging. Therefore, it is imperative that insurance companies actually receive a "fair and adequate rate of return" within a reasonable period of time. *Cf. Helmsley*, supra, 78 N.J. at 242, 394 A.2d 65 (holding that a more moderate regulatory scheme, *i.e.* one that does not attempt to keep investors' returns at the constitutional minimum, must be adopted where the governing body is not prepared to support a sophisticated

> administrative relief system providing for prompt, fair and efficacious processes). Neither the insurance company nor this state's insurance market will be adequately protected by the pyrrhic discovery after it has ceased doing business here (and perhaps elsewhere) that it deserved a rate increase five years ago.[26]

Notwithstanding her stated concerns, Justice Garibaldi concurred in the dismissal of the "facial" challenge in *State Farm*, so that the statute could be tested "as applied." The decision below provides the as applied challenge that Justice Garibaldi foresaw, and its circumstance parrots the very concern expressed by Justice Garibaldi. Nevertheless, notwithstanding Justice Garibaldi's opinion in *State Farm*, when again faced with this issue in the case of whether the statute as applied offered the necessary constitutional protection, the New Jersey Supreme Court declined review.

V. The Necessity For Review By the Supreme Court

The legislature and the courts of the State of New Jersey – operating in a highly charged political atmosphere – are not prepared to address the constitutional issues which have been raised. Their reticence to address these constitutional issues has created a split of authority between the courts and has exacerbated the insurance crisis.[27] Supreme Court review is particularly warranted in these circumstances.

Rule 10.1 of this Court indicates that the Court will particularly consider review of decisions on federal questions by state courts of last resort which conflict with

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[26] *State Farm*, 124 N.J. at 66-68, 590 A.2d at 209-210.

[27] New Jersey seems content to ignore the mounting crisis, perhaps under the theory that carriers will not be forced into insolvency because they can offset their losses by charging higher rates in other states. This is the very argument that was rejected by the California court in *Calfarm*, 48 Cal.3d at 818-19, 771 P.2d at 1254, 258 Cal. Rptr. at 168.

decisions of other state courts of last resort or of federal courts of appeal. Here, the decision by the New Jersey Appellate Division (as adopted by the New Jersey Supreme Court in denying certiorari and dismissing the appeal) conflicts with the decisions of the California Supreme Court and the Ninth Circuit Court of Appeal on the question of whether interim relief must be afforded where rate suppression is claimed to be "temporary." This Court should accept this cases to resolve this conflict and protect important constitutional rights from being impaired or lost.

It is beyond dispute that under the takings clause of the 5th Amendment, where a state regulates an industry, it must nevertheless allow the affected businesses to obtain a "fair return" on their property in light of the risks borne.[28] Typical of the language of the pertinent cases is the requirement from *Duquesne* that courts scrutinize

> what is a fair rate of return given the risks under a particularly rate setting system and . . . the amount of capital upon which the investors are entitled to earn that return.[29]

Moreover, even a temporary "taking" offends the 5th Amendment.[30] Accordingly, since the 5th Amendment permits a "taking" only after due process of law, it will permit rate suppression only if there is an adequate mechanism to obtain relief from suppression which does not allow a fair return.

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[28] *Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989); *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944); *Prendergast v. New York Tel. Co.*, 262 U.S. 43 (1923); *Tenaco Oil Co. v. Department of Consumer Affairs*, 876 F.2d 1013, 1029 (1st Cir. 1989).

[29] *Duquesne*, 488 U.S. at 310.

[30] *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987); *Prendergast v. New York Tel. Co.*, 262 U.S. 43 (1923).

In cases of monopoly, it is sufficient to permit subsequent rate increases which will counterbalance the losses incurred in the period of suppressed, below-fair returns.[31] However, where, as here, the adversely affected business is not a monopoly and it is not permitted to recoup its losses through future rate increases, the *only* procedural safeguard is a prompt, meaningful hearing. The California Supreme Court and the Ninth Circuit cases have upheld this procedural safeguard, but the instant decision of the New Jersey Appellate Division and Supreme Court departs from the rule and requires correction by this Court.

In *Calfarm*, after reciting that regulated companies have a right to obtain a reasonable return on their property, the California Supreme Court stated that the key it would focus on was "the ability of the [business] to obtain relief if that rate proves confiscatory."[32] It held that Proposition 103 failed to provide a satisfactory relief mechanism because an insurer could seek relief under the scheme only where it would become insolvent as a result of the rates.[33] However, in ruling against the insurance commissioner,[34] the court also addressed, and squarely rejected, the commissioner's argument that the temporary character of the rollback obviated the constitutional requirement of procedural due process:

> We recognize that emergency situations may require emergency measures. . . .

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[31] *E.g., Potomac Electric Power Co. v. Public Service Comm'n*, 380 A.2d 126 (D.C. 1977) (recoupment through future rate increase).

[32] 48 Cal.3d at 816, 771 P.2d at 1252, 258 Cal. Rptr. at 166.

[33] *Id.* at 821, 771 P.2d at 1255-56, 258 Cal. Rptr. at 169.

[34] After severing the offending provision, the Court did uphold the remainder of the statute as providing an adequate mechanism for review – a timely mechanism which is not available under the New Jersey statutory scheme.

> To justify a measure which deprives persons of a fair return, however, an emergency would have to be a temporary situation of such enormity that all individuals might reasonably be required to make sacrifices for the common weal. We do not believe that the circumstances which inspired Proposition 103 meet this requirement. . . . The asserted rise in insurance rates, rendering insurance unavailable or unaffordable to many, is not a temporary problem; it is a long term, chronic situation which will not be solved by compelling insurers to sell at less than a fair return for a year. *Over the long term the state must permit insurers a fair return; we do not perceive any short term conditions that would require depriving them of a fair return.*[35]

Thus the California Supreme Court interpreted the taking clause as requiring a mechanism for addressing inadequate rates *even in the short term.*

The Ninth Circuit Court of Appeals reached the same result in the Nevada case concerning 1989 Nev. Stat. 784, which provided for a 15% rollback of auto insurance rates and a freeze at the level.[36] In a decision which carefully paralleled and discussed *Calfarm,* the court invalidated the Nevada statute as failing to guarantee the constitutionally required "fair and reasonable return."[37] The court cited with approval, and relied upon, the lengthy passage from *Calfarm* quoted above which rejected the purported justification of the lack of due process on the ground it was merely "temporary."

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[35] *Id.* at 820-21, 771 P.2d at 1255, 258 Cal. Rptr. at 169 (emphasis added).

[36] *Guaranty Nat'l Ins. Co. v. Gates,* 916 F.2d 508 (9th Cir. 1990).

[37] *Id.* at 515.

By contrast, the New Jersey Supreme Court first rejected the "facial challenge" to FAIRA on the grounds that adequate review could be obtained through the administrative process,[38] but then inexplicably refused to hear the instant case which brought before it the "as applied" challenge when the administrative procedure failed to provide meaningful and timely relief.

With the rulings of the New Jersey Appellate Division and Supreme Court, there is now a direct conflict with *Calfarm* and *Gates*. The decision below approves as the ostensible due-process saving mechanism a process which could take several years to reach a determination[39] and which gives neither interim nor retroactive relief if the rates are shown by the lengthy process to be confiscatory. Thus it necessarily holds that the supposed temporary character – although lengthy – of the denial of due process is permissible. This result is in conflict and is incorrect.

Particularly as rate suppression statutes are mushrooming throughout the country, it is essential that the constitutional invalidity of these provisions be subject to proper scrutiny by the courts and that this scrutiny not be avoided and frustrated due to the absence of mechanisms for interim relief. The withdrawals and insolvencies that will inevitably follow if the validity of rate suppression statutes cannot be tested for years will have a devastating impact on the automobile insurance industry and its ability to underwrite risks.

The New Jersey situation poses a clear cut example of the abuse by a state of the rate regulation power. The Supreme Court is the last hope of the insurance industry, and the public it serves, to rectify this situation.

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[38] *State Farm*, 124 N.J. 32, 63, 590 A.2d 191, 207 (1991).

[39] *See* Petition at 7; *cf.* Petition at 3-4n.5.

CONCLUSION

For the reasons set forth herein and in the Petition for a Writ of Certiorari, the Petition should be granted.

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Respectfully submitted,

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